IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

STATE OF OKLAHOMA, *et al.* Plaintiffs, v. TYSON FOODS, INC., *et al.* Defendants.	))))))))))	Case No. 4:05-cv-00329-GKF-PJC

DEFENDANTS' JOINT RESPONSE IN OPPOSITION TO PLAINTIFFS' MOTION FOR RECONSIDERATION OF THE COURT'S JULY 22, 2009 OPINION AND ORDER (DKT. NO. 2392)

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Defendants respectfully oppose Plaintiffs' motion ("Motion") to reconsider the Court's decision granting in part Defendants' Rule 19 Motion to dismiss for failure to join the Cherokee Nation as a required party. *See* Opinion and Order, Dkt. No. 2362 (July 22, 2009) ("Order"). Plaintiffs' Motion is premised on the unspoken conclusion that the Cherokee Nation lacks sovereign rights in the natural resources of the Illinois River Watershed ("IRW") that are exclusive of the State's control. The State asserts that pursuant to CERCLA it can—without the prior consent or participation of the Cherokee Nation—make decisions about what actions should be taken to investigate and remediate alleged pollution of Cherokee resources, sue to enforce those decisions, and recover costs and "damages" for natural resources in which the Cherokee Nation has an interest. Plaintiffs base this assertion on two arguments: (1) that the State of Oklahoma is sovereign within its physical boundaries, and therefore has the automatic right to investigate pollution within the State and recover its costs under CERCLA; and (2) that it is automatically a "co-trustee" of the natural resources that Congress granted to the Cherokee, regardless of whether the Cherokee have consented to relinquish a portion of their exclusive right to control those natural resources.

Plaintiffs' Motion is wrong and should be denied.[1] First, CERCLA does not strip the

[1] Plaintiffs' quixotic effort to resuscitate their CERCLA claims, even if successful, would be short-lived as Counts 1 and 2 should in any event be dismissed for the reasons set out in Defendants' summary judgment motion on CERCLA. *See* Dkt. No. 1872. Most notably, Plaintiffs cannot demonstrate that this case implicates CERCLA at all. Plaintiffs originally alleged injuries flowing from numerous substances including *inter alia* arsenic, copper, and zinc. *See* Second Amended Complaint, Dkt. No. 1215 at ¶¶57-61. However, Plaintiffs now acknowledge that their CERCLA claims are limited to the alleged effects of orthophosphates, *see* Dkt. No. 2118, at 3-4 (May 29, 2009), which simply are not covered by CERCLA, *see* Dkt. No. 1872 at 8-12; Dkt No. 1925 at 1-5. Plaintiffs base their claim that CERCLA covers all phosphorous compounds on Judge Eagan's decision in the *City of Tulsa* case. But in the wake of that decision and the Complaint in this case, EPA considered the issue and promulgated a guidance memorandum specifically rejecting that conclusion. *See* Dkt. No. 1872 Ex. 23 at 2 ("Elemental phosphorus and specific phosphorus and nitrogen compounds are listed hazardous substances [under CERCLA]. Elemental nitrogen, and phosphorus and nitrogen compounds

Cherokee Nation of its exclusive jurisdiction to govern and control its own resources. Rather, CERCLA recognizes the preexisting sovereign rights of the federal government, Indian Tribes, and the States within their respective jurisdictions. No authority holds that CERCLA stripped tribal rights and made States trustees over Indian resources. While CERCLA certainly authorizes States to investigate and remediate public and private properties within the State's jurisdiction, nothing in CERCLA made Oklahoma sovereign over the Cherokee Nation.

Second, while arguing the merits of their interpretation of CERCLA, Plaintiffs largely ignore the relevant question under Rule 19: whether crediting Plaintiffs' claim to be a "co-trustee" over the entire Oklahoma IRW would impair the Cherokee Nation's claimed rights and interests in the IRW. As this Court explained, the Rule 19 decision turns not on whether the Cherokee Nation actually possesses an exclusive sovereign interest, but whether it *claims* such an interest. *See* Order at 8. As the State has now conceded, the Cherokee Nation asserts a claim over the natural resources of the IRW. *See* Dkt. No. 2108-2, at 1. The Cherokee Nation's claim is not that of a mere landowner, but rather that Congress promised it perpetual, exclusive, and sovereign control over the natural resources of the IRW, free from state control or interference. *See, e.g.*, Treaty with the Western Cherokee, May 6, 1828, preamble, 7 Stat. 311 (promising the Cherokee "a permanent home … which shall, under the most solemn guarantee of the United States, be, and remain, theirs forever" free of the "jurisdiction of a Territory or State"). In direct contravention of Congress' promises to the Cherokee, Plaintiffs seek a ruling that CERCLA

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other than those listed are not hazardous substances."). Plaintiffs take Defendants to task for meeting with EPA to point out the error in Plaintiffs' CERCLA claims, *see* Dkt. No. 1913, at 14-15, but that merely confirms that EPA's guidance was intended to specifically address Plaintiffs' allegations in this case. Similarly, Plaintiffs cannot show that the entire million-acre IRW is a single "facility" for purposes of CERCLA. *See* Dkt. No. 1872 at 19-25; *New Jersey Turnpike Auth. v. PPG Indus., Inc.*, 197 F.3d 96, 105 (3d Cir. 1999). Because Plaintiffs cannot demonstrate the release of any CERCLA-covered hazardous substance or a CERCLA facility, Plaintiffs' CERCLA claims in Counts 1 and 2 must be dismissed on their merits.

grants the State jurisdiction to independently investigate and remediate alleged pollution of Indian resources, and sue to obtain cost recovery and natural resource damages ("NRDs") for alleged harm to tribal resources, regardless of the Cherokee Nation's involvement or consent. Such a ruling would necessarily denigrate the exclusive sovereign prerogatives claimed by the Cherokee Nation and would expose Defendants to a risk of double recovery. Thus, under Rule 19 it would be improper to proceed with Plaintiffs' CERCLA claims in the absence of the Cherokee Nation.

For these reasons, the Court correctly dismissed Plaintiffs' CERCLA claims, and the Motion to reconsider should be denied.

ARGUMENT

Defendants' Rule 19 Motion, Dkt. Nos. 1788 & 1790 (Oct. 31, 2008), asked the Court to dismiss certain of Plaintiffs' claims for failure to join the Cherokee Nation[2] as a required party to this litigation, or in the alternative for lack of standing. *Id.* at 1-24. The Court granted the Rule

[2] Defendants' Rule 19 Motion refers to the modern Cherokee Nation as the trustee of the natural resources that Congress gave by treaty to the Cherokee Indian Tribe. Since the Rule 19 Motion was filed, the Bureau of Indian Affairs of the Department of the Interior issued two opinions raising the question whether those resources are actually held by two Cherokee governments (the Cherokee Nation and the United Keetoowah Band of Cherokee Indians) as mutual successors-in-interest that inherited the treaty rights promised to the Cherokee. *See United Keetoowah Band of Cherokee Indian v. Director, Eastern Oklahoma Region, Bureau of Indian Affairs*, Decision (June 24, 2009); *United Keetoowah Band of Cherokee Indian v. Director, Eastern Oklahoma Region, Bureau of Indian Affairs*, Decision and Briefing Schedule (July 30, 2009) (attached as Ex. A). The Bureau's decisions support Defendants' Rule 19 analysis as they affirm that the rights Congress granted the Cherokee are still held in trust by a sovereign Indian Tribe. *See id.* Although the Bureau's decisions leave for later adjudication which of these two Tribes inherited which of the Cherokee's specific natural resources, that issue is not before this Court. *See id.* (setting a briefing schedule on which of these Tribes is the appropriate successor-in-interest). Because the Court dismissed Plaintiffs' claims rather than allocating the interests of the State and the Cherokee within the IRW, the Court need not adjudicate which modern Tribe is the trustee of which natural resources in this case, and which natural resources belong to the State. Because the parties have referred to the Cherokee's sovereign interests as the "Cherokee Nation," this brief will continue that nomenclature.

19 Motion in part, dismissing Counts 1, 2, and 10 in their entirety, and dismissing Plaintiffs' claims for monetary damages under Counts 4, 5 and 6. *See* Order at 15, 16, 21. Plaintiffs now seek reversal of the Court's Order solely with respect to Plaintiffs' CERCLA natural resource damages claim (Count 2) and CERCLA response costs claim (Count 1). *See* Mot. at 1. Because reversal of either ruling would undermine the Cherokee Nation's asserted interests in the IRW in the absence of the Cherokee, and would potentially expose Defendants to a risk of double recovery, Plaintiffs' Motion should be denied.

I. Plaintiffs' Routine Motions for Reconsideration are Contrary to the Federal Rules and Waste the Resources of the Parties and the Court

It has been Plaintiffs' pattern and practice to seek reconsideration of every decision rendered by this Court that they perceive to be adverse to their interests in this litigation, no matter how well founded a particular decision may be. *See*, *e.g.*, *Plaintiffs' Motion to Reconsider the Court's February 26, 2007 Opinion and Order*, Dkt. No. 1074 (Mar. 8, 2007); *Plaintiffs' Motion for Reconsideration of Order Compelling Discovery*, Dkt. No. 1153 (May 29, 2007); *Plaintiffs' Motion to Reconsider Amended Scheduling Order*, Dkt. No. 1386 (Dec. 3, 2007); *Plaintiffs' Motion to Reconsider the Court's Opinion and Order*, Dkt. No. 1463 (Jan. 16, 2008); Dkt. No. 1486 (Jan. 28, 2008); *Plaintiffs' Motion for Reconsideration of the Court's July 24, 2009 Opinion and Order (Dkt. #2362)*, Dkt. No. 2392 (Aug. 3, 2009); Dkt. No. 2443 (Aug. 7, 2009). These motions are improper under the Federal Rules as they waste the resources of the parties and the Court revisiting issues that have already been decided. Judicial decisions "are not intended as mere first drafts, subject to revision and reconsideration at a litigant's pleasure." *Quake AlloyCasting Co. v. Gulfco Indus., Inc.*, 123 F.R.D. 282, 288 (N.D. Ill. 1988). "Courts uniformly agree that a Rule 59(e) motion to reconsider is designed to permit relief in extraordinary circumstances and not to offer a second bite at the proverbial apple." *Maul v.*

Logan County Bd. of County Comm'r, 2006 U.S. Dist. LEXIS 86934, *2 (W.D. Okla. Nov. 29, 2006); *see Lumpkin v. United Recovery Sys., L.P.*, 2009 U.S. Dist. LEXIS 60752, *4-5 (N.D. Okla. July 16, 2009) (Frizzell, J.) (same). Accordingly, reconsideration is only justified in the event of "(1) an intervening change in the controlling law, (2) new evidence previously unavailable, and (3) the need to correct clear error or prevent manifest injustice." *Servants of the Paraclete v. Does*, 204 F.3d 1005, 1012 (10th Cir. 2000). *Id*. Under this standard, "[p]arties' efforts to revisit issues already addressed or advance arguments that could have been raised in prior briefing will not be considered." *Lumpkin*, 2009 U.S. Dist. LEXIS 60752 at *5 (internal quotations omitted); *see also Maul*, 2006 U.S. Dist. LEXIS 86934 at *3.

Plaintiffs' Motion does not comply with these standards. Plaintiffs do not raise an intervening change in the controlling law or previously unavailable evidence. Rather, Plaintiffs press arguments that could have been—and were—discussed in the briefs and at oral argument. Plaintiffs provide no justification for the Court to revisit their assertion that the State's CERCLA claims are not impacted by the Cherokee Nation's competing interests. For this reason, reconsideration should be denied.

II. The Court Properly Dismissed Plaintiffs' CERCLA Claims

Plaintiffs repeatedly accuse the Court of having "misapprehended the law" in dismissing their CERCLA claims. *See* Mot. at 8, 17. With regard to Count 1, Plaintiffs argue that the Court erred in not recognizing that the Cherokee Nation is irrelevant to Plaintiffs' effort to recover their costs even if those costs were incurred investigating natural resources that the Cherokee Nation claims as its own. *Id.* at 17-18. And with regard to Count 2, Plaintiffs assert that the Court failed to apprehend that CERCLA authorizes the State of Oklahoma to bring a CERCLA NRD claim as a "co-trustee" over all of the natural resources in the IRW even in the absence of the Cherokee.

Id. at 5-7, 9-11.[3] But far from misapprehending the law, the Court properly concluded that, under the circumstances presented in this case, allowing Plaintiffs to proceed would undermine the Cherokee Nation's asserted interests in the IRW and potentially expose Defendants to a substantial risk of double recovery or multiple and inconsistent obligations. *See* Order at 15; Fed. R. Civ. P. 19(a)(1)(B)(i)&(ii).[4]

A. Proceeding With Either CERCLA Claim Without the Cherokee Will Impede or Impair the Cherokee Nation's Asserted Sovereign Interests in the IRW

Plaintiffs' principal argument is that CERCLA authorizes a State to make unilateral decisions as trustee (or "co-trustee") over, and to enter upon, investigate, and recover costs associated with, any natural resources within the State's borders—regardless of whether Congress previously committed those same natural resources to the exclusive jurisdiction of an Indian Tribe. CERCLA, however, makes no such grants of authority. Rather, CERCLA merely recognizes the preexisting spheres of jurisdiction in the United States and appoints each State, Indian Tribe, and the federal government to serve as trustee of the natural resources within their respective preexisting jurisdictions. CERCLA in no manner expands their respective jurisdictions. Proceeding with Plaintiffs' CERCLA claims here in the absence of the Cherokee

[3] Tellingly, Plaintiffs continue to assert that the State—not the Cherokee Nation—is the exclusive owner and trustee for the natural resources in the Oklahoma portion of the IRW. *See* Dkt. No. 2392 at 3 ("the State continues to maintain that it does own the natural resources at issue"). However, in light of the Court's Order, Plaintiffs now contend that "even assuming that the Cherokee Nation also has a CERCLA trusteeship interest in the resources at issue (or some portion thereof)," CERCLA permits the State of Oklahoma to pursue the natural resource damages claim in Count 2 as a "co-trustee" even in the absence of the Cherokee. *Id.* at 3-4; *id.* at 1 (claiming that "one trustee can sue for the entirety of the damages to the injured natural resource"); *see id.* at 5-15.

[4] Plaintiffs' Motion only contests the Court's finding that the Cherokee Nation is a "required party" under Rule 19. The Motion does not address the Court's rulings that "joinder of the Cherokee Nation is not feasible," Order at 16, and "in equity and good conscience, the State's claims … should not proceed among the existing parties," *id.* *See* Dkt. No. 2392 at 5-15. As a result, those Rule 19 factors are not addressed herein.

Nation would require a holding that CERCLA expanded the State's jurisdiction over Indian resources, undermining the Cherokee Nation's claim to exclusive sovereignty. Entering such a judgment in the absence of the Nation would be contrary to Rule 19.

1. CERCLA Does not Authorize States to Serve Unilaterally as "Trustees" or "Co-Trustees" Over Indian Tribes' Natural Resources

CERCLA recognizes "trustees" over natural resources within the United States and provides those trustees with jurisdiction to investigate and remediate NRDs caused by the release of specified hazardous substances. *See* 42 U.S.C. § 9607(f). In describing the various sovereigns in the United States that may serve as trustees, CERCLA does not purport to transfer preexisting rights between the federal, state, and tribal governments, but rather appoints each as the CERCLA "trustee" over the natural resources already subject to its jurisdiction. *See, e.g.*, 42 U.S.C. §§ 9607(f)(1) (assigning CERCLA trusteeship to federal, state and tribal governments); 9607(f)(2) (stating that the various CERCLA trustees may seek NRDs "for those resources under their trusteeship"). As one treatise noted, "CERCLA designates federal agencies, states and Indian tribes to act as trustees for the resources *within their jurisdiction.* An Indian tribe is a designated trustee for the natural resources on lands 'belonging to, managed by, controlled by, appertaining to, or held in trust for the benefit of such tribe, or belonging to a member of such tribe if such resources are subject to a trust restriction on alienation.'" 2A-15A *Environmental Law Practice Guide* § 15A.05 (2009) (quoting 42 U.S.C. § 9607(f)(1)) (emphasis added)). CERCLA authorizes States to act as trustees for natural resources already subject to State jurisdiction, specifically those "within the State or belonging to, managed by, controlled by, or appertaining to such State." 42 U.S.C. § 9607(f)(1). CERCLA does not confer upon Oklahoma jurisdiction to invade or diminish a separate sovereign's interests by claiming that the State is a "co-trustee" for natural resources that are exclusively owned and held in trust by that

sovereign.[5,6]

Plaintiffs' interpretation of CERCLA conflicts both with the plain meaning of 42 U.S.C. § 9607(f)(1) and with the federal government's interpretation and application of CERCLA. Federal regulations confirm that CERCLA's natural resource damages provisions do not confer new trustee status or rights. Rather,

> CERCLA provides that trustee officials can *only* recover damages for injuries to those resources that are related to them through ownership, management, trust, or control. These relationships are *created by other Federal, State, local, and tribal laws*.

59 Fed. Reg. 14262, 14268 (Mar. 25, 1994) (emphasis added).

In this instance, the scope of the Cherokee Nation's preexisting jurisdiction under "other Federal, State … and tribal laws" is clear. When the Cherokee were forced to leave their homes in the East, the federal government gave the Cherokee all of the natural resources in the IRW and promised that the Nation would forever own and control those natural resources without interference from state government. *See*, *e.g.*, Treaty with the Cherokee, Feb. 14, 1833, preamble, 7 Stat. 414; Treaty with the Cherokee, Dec. 29, 1835, 7 Stat. 478, art. 2, 5 (Treaty of New Echota); Treaty with the Cherokee Indians, July 19, 1866, 14 Stat. 799, art. 5, 6, 26. The

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[5] Plaintiffs have previously conceded, as they must, that CERCLA does not permit Oklahoma to recover NRDs for alleged injury to natural resources held in trust by the sovereign State of Arkansas, or "cost recovery" for investigating and remediating pollution in Arkansas. *See* Dkt. No. 1810 at 3 n.3. To the extent the Cherokee Nation owns or holds in trust natural resources in the IRW, it enjoys a sovereign interest in those resources just as Arkansas enjoys with respect to natural resources in the Arkansas portion of the IRW. The Cherokee Nation's sovereign interests are not subordinate to those claimed by Oklahoma. It is just as improper for Oklahoma to disregard the exclusive rights and sovereign interests of the Cherokee Nation as it would be for Oklahoma to disregard the rights and interests of Arkansas.

[6] Tellingly, although Congress expressly waived the federal government's sovereign immunity for CERCLA purposes in 42 U.S.C. § 9620(a), Congress made no such waiver of sovereign immunity as to any Indian Tribe. Accordingly, the Cherokee Nation's rights as an independent sovereign are unaffected by CERCLA's provisions, and are not subordinated to the State of Oklahoma.

federal government "guarantee[d] to them lasting and undisturbed possession" of these resources, Felix S. Cohen, *Handbook Of Federal Indian Law* § 1.03[4][a], p. 46 & n.279 (2005) (quoting Office of Ind. Aff. Ann. Rep., S. Doc. No. 19-1 at 91 (1825)), and promised the Cherokee that these natural resources "shall, under the most solemn guarantee of the United States, be, and remain, theirs forever" free of the "jurisdiction of a Territory or State", Treaty with the Western Cherokee, May 6, 1828, preamble, 7 Stat. 311. *See also Choctaw Nation v. Oklahoma*, 397 U.S. 620, 622-28 (1970). Lest there be any ambiguity that Oklahoma would exercise concurrent authority or "co-trustee" status over these resources, Oklahoma officially renounced all rights in Indian resources as a condition of statehood. Act of June 16, 1906, 34 Stat. 267 at 267-68; Okla. Const., Art. I, § 3 ("The people inhabiting the State do agree and declare that they forever disclaim all right and title in or to any unappropriated public lands lying within the boundaries [of Oklahoma], and to all lands lying within said limits owned or held by any Indian, tribe, or nation . . . ."). The federal government expressly retained exclusive authority over Indian matters. *See* Presidential Procl. of Nov. 16, 1907, 35 Stat. 2160. As a result, within Oklahoma, "[t]ribes have plenary and exclusive power over their … territory subject only to limitations imposed by federal law." Cohen, *supra*, § 4.01[1][b].[7]

Having lost their argument that the Cherokee claim no relevant rights in the IRW,

[7] Plaintiffs' claim rests entirely on the fact that the State has the Cherokee Nation's natural resources surrounded. Mot. at 9. Contrary to Plaintiffs' claim, the fact that a tribal resource is wholly surrounded by State property does not render it "within the State or belonging to, managed by, controlled by, or appertaining to such State" for purposes of 42 U.S.C. § 9607(f)(1). The law is clear that Indian Tribes are separate, sovereign political entities existing free from state jurisdiction. *See Rice v. Olson*, 324 U.S. 786, 789 (1945) ("the policy of leaving Indians free from state jurisdiction and control is deeply rooted in the Nation's history"). Moreover, as noted above, when Oklahoma disclaimed jurisdiction over the Cherokee's natural resources, it expressly recognized that these resources are encompassed within the State's boundaries and nevertheless gave up any argument to sovereignty flowing from that fact. *See* Okla. Const., Art. I, § 3 (disclaiming "all right and title" to Indian resources "within the boundaries" of Oklahoma).

Plaintiffs now argue that CERCLA somehow granted the States automatic trusteeship over tribal resources even absent a Tribe's agreement. Mot. at 3-15. This claim is contrary not only to CERCLA's plain text and implementing regulations, but also contradicts a century of Supreme Court caselaw holding that tribal rights may not be diminished unless Congress provides "clear evidence that [it] actually considered the conflict between its intended action on the one hand and Indian treaty rights on the other, and chose to resolve that conflict by abrogating the treaty." *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 202-3 (1999) (quoting *U.S. v. Dion*, 476 U.S. 734, 739-40 (1986)); s*ee also White Mountain Apache Tribe v. Bracker*, 448 U.S. 136 (1980); *Fisher v. District Court*, 424 U.S. 382, 387-88 (1976); *Menominee Tribe of Indians v. U.S.*, 391 U.S. 404, 412 (1968); *U.S. ex rel. Hualpai Indians v. Santa Fe. Pac. R.R.*, 314 U.S. 339, 346, 353 (1941); *NLRB v. Pueblo of San Juan*, 276 F.3d 1186, 1995-96 (10th Cir. 2002). Any ambiguities about a diminishment of Indian rights is to be resolved in favor of the Cherokee. *See* Cohen, *supra* § 2.02. CERCLA says nothing about diminishing exclusive tribal rights by granting States co-trusteeship over Indian resources. Plaintiffs are therefore incorrect in assuming that CERCLA intended to grant States a co-trusteeship over Indian resources that the States did not previously possess.

Plaintiffs are correct that CERCLA contemplates some instances in which multiple trustees will have a trust interest in the same natural resource. Mot. at 6. But, consistent with CERCLA's approach of utilizing established trust relationships, such overlapping trusteeships follow only where overlapping interests exist independent of CERCLA. For example, it is well established that the Federal government holds Indian lands and other natural resources in trust for the benefit of tribal members.[8] Accordingly, both the federal government and Indian Tribes

[8] *See, e.g., Cohen, supra,* §§ 5.02 n.86, ("The United States holds title to the fee of Indian property in trust for the tribes."); 15.03 ("Most tribal land is held in trust by the federal

have co-existing interests in the very same natural resources.[9] But the same is not true of the States. In fact, the federal courts have repeatedly held that States are completely excluded from trusteeship over Indian resources.[10]

Plaintiffs have not demonstrated pre-existing authority to serve as trustee for the natural resources in the Oklahoma portion of the IRW, and cannot rely upon CERCLA to confer such authority in derogation of the Cherokee's sovereign interests. Thus, to the extent that the

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government for the beneficial ownership of the tribe"); *United States v. Shoshone Tribe*, 304 U.S. 111, 115, 117 (1938) (United States holds "legal title" to reservation lands set aside by treaty; tribe has "beneficial ownership" of land and resources); *Morrison v. Work*, 266 U.S. 481, 485 (1925) ("[t]he United States is now exercising, under the claim that the property is tribal, the powers of a guardian and of a trustee in possession"); *Ash Sheep Co. v. United States*, 252 U.S. 159, 165 (1920) ("It is obvious that the relation thus established by the act between the Government and the tribe of Indians [with respect to unsold ceded land] was essentially that of trustee and beneficiary").

[9] *See supra*, n.3. Multiple sovereigns may also join voluntarily in a CERCLA action addressing cross-boundary natural resources. In such a suit, each CERCLA trustee has jurisdiction to address resources within its own political jurisdiction, but cooperates with the others for purposes of a comprehensive resolution. The federal government has promulgated procedures for cooperation between multiple CERCLA trustees, which Plaintiffs have ignored. *See* 40 C.F.R. 300.615(a) ("Where there are multiple trustees, because of coexisting or contiguous natural resources or concurrent jurisdictions, they should coordinate and cooperate in carrying out these responsibilities."); *see also* 43 C.F.R. § 11.32(a)(1)(ii). Rather than coordinating with the Cherokee Nation, Plaintiffs have asserted that the entire IRW is a single CERCLA facility subject to their control. Accordingly, the issue before the Court is *not* whether multiple CERCLA trustees can voluntarily elect to bring a claim together. The issue is whether a State has unilateral authority to invoke CERCLA as to natural resources located within the jurisdiction of a different sovereign but in the absence of that sovereign, simply because those resources are located within the State's outer boundaries.

[10] *See Rice v. Olson*, 324 U.S. 786, 789 (1945) ("The policy of leaving Indians free from state jurisdiction and control is deeply rooted in the Nation's history."). The Supreme Court has spoken specifically to the Cherokee Nation's independence from state governments. In *Worcester v. Georgia*, 31 U.S. 515, 562-563 (1832), Chief Justice Marshall emphasized that:

> The Cherokee nation, then, is a distinct community, occupying its own territory.... The whole intercourse between the United States and this nation, is, by our Constitution and laws, vested in the government of the United States.…
> …
> [Relations with] the Cherokee nation, … are committed exclusively to the government of the Union.

See also Cohen, *supra*, § 6.01.

Cherokee Nation owns or holds in trust natural resources in the IRW, CERCLA does not grant the State jurisdiction over them. This is *not* a situation where two governments are co-trustees over the same natural resources. The natural resources at issue are either the State's or the Cherokee Nation's, not both.

Plaintiffs' argument to the contrary relies almost exclusively on the district court's decision in *United States v. Asarco, Inc.*, 471 F. Supp. 2d 1063, 1065 (D. Idaho 2005) ("*Coeur d'Alene II*"). Plaintiffs assert that this decision stands for the proposition that a State is a co-trustee of any natural resources held by Indian Tribes within the State's boundaries, and that therefore a co-trusteeship exists in this case without any need to determine the Cherokee Nation's actual interests in the IRW. *See* Mot. at 1, 3-4, 7-8, 11-13. But the court's decision in *Coeur d'Alene II* does not support Plaintiffs' argument for several reasons.

First, in *Coeur d'Alene II*, the only issue before the court was whether *the federal government* and the Coeur d'Alene Indian Tribe could be co-trustees over the same natural resources. *See* 471 F. Supp. 2d at 1067-69. As noted above, it is well settled that the federal government is in a trust relationship with all federally recognized Indian Tribes, which are dependent nations and wards of the federal government. *See, e.g., supra*, nn. 3, 5. The State of Idaho was not a party to the case. *See id*. at 1065. Accordingly, the issue of whether a State can be a co-trustee with an Indian Tribe was not raised, much less the question whether a State is automatically a co-trustee of Indian resources within its boundaries regardless of the Nation's lack of participation in the case or consent. Contrary to Plaintiffs' argument, it is well settled that States do not share a trust relationship with Indian Tribes over tribal resources, *see, e.g., supra*, n.5, and *Coeur d'Alene II* does nothing to upset that principle.[11]

[11] Plaintiffs cite *United States v. Shell Oil Co.*, 605 F. Supp. 1064 (D. Colo. 1985), for the proposition that co-trusteeships can exist under CERCLA. Mot. at 6. *Shell Oil* sheds no light on

Second, the *Coeur d'Alene II* decision did no more than recognize that, in some circumstances, two governments may be co-trustees and either co-trustee may bring a CERCLA action. *Id.* at 1068-69. As discussed above, whether such a co-trustee relationship exists in any particular case depends on the existence of such a relationship outside of CERCLA. *See supra* at 6. The court and parties in *Coeur d'Alene II* also recognized that natural resources can be subject to just a single trustee, and that plaintiffs cannot "recover damages for injury to natural resources over which they are not a trustee." *Id.* at 1067-68 ("If the Court were to find that the State of Idaho was the sole trustee as to a given natural resource" a settlement with the State would be final). These points are in harmony with this Court's Order. *See* Order at 11 ("The State's pursuit of such claims … absent the Cherokee Nation ignores the Nation's sovereign right to manage the natural resources within its jurisdiction and seek redress for pollution thereto."); *Id.* at 22 ("A plaintiff does not have standing to assert a claim of injury to property it does not own or hold in trust. Although the State has standing to assert its claims relative to its own rights in the IRW, it has no standing as a 'quasi-sovereign' to seek damages for injury to lands and natural resources in the IRW that fall within the Cherokee Nation's sovereign interests.").

Finally, even if the State could be a co-trustee with an Indian Tribe (which it cannot), the *Coeur d'Alene II* decision suggests that Plaintiffs have failed to undertake the necessary steps to avoid dismissal under Rule 19. In *Coeur d'Alene II*, both the United States and the Tribe were parties to the litigation. Consequently, both alleged "trustees" were bound by the judgment and there was no risk of multiple and inconsistent obligations being placed upon the defendants in

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this issue, as the court merely assumed a co-trusteeship and did not analyze the question. *See* 605 F. Supp. at 1080-81. Moreover, the alleged co-trustees in *Shell Oil* were the federal and state governments, a situation where it *is* possible for both to have trusteeship over the same natural resources. Thus, *Shell Oil* does not address whether a State may assert trusteeship over an Indian Tribe's resources.

subsequent litigation by an absent trustee. Moreover, because both trustees were parties to the action, the court was not required to determine whether a non-party held rights in the property at interest, or to define the scope of those rights. Here, the State filed suit without the involvement of the Cherokee Nation. Moreover, in *Coeur d'Alene*, the federal government and the Tribe executed a "Memorandum of Agreement" prior to filing suit. This Agreement defined the scope of their co-trusteeship and their rights in the recovery and restoration of the natural resources. *See Coeur d'Alene II*, 471 F. Supp. 2d at 1066, 1068; Memorandum of Agreement, 3:96-cv-00122-EJL, Dkt. No. 1412 Ex. A (June 18, 1992). A copy of that Agreement is attached as Ex. B. Accordingly, the court did not face questions about the existence or scope of the co-trusteeship, nor was the court concerned about potential disputes over the disposition of any recovery. Here, by contrast, Plaintiffs seek to recover all NRDs in the Oklahoma portion of the IRW in the absence of the Cherokee and to spend any recovery on remedial actions according to their own preferences.

As the foregoing discussion demonstrates, CERCLA does not authorize a State government to assert trusteeship over natural resources in which the State does not otherwise have an interest. Although the Cherokee Nation's resources are encompassed by Oklahoma's political boundaries, the Cherokee Nation is an independent sovereign. Accordingly, Oklahoma cannot assume trusteeship over the Cherokee Nation's exclusive interests.

2. The Court Was Correct in Holding That Plaintiffs' CERCLA Claims Cannot Proceed Without an Allocation of Interests in the IRW

Plaintiffs also allege that the Court erred in finding that an allocation of the interests of Oklahoma and the Cherokee Nation in IRW natural resources would be required if Plaintiffs' CERCLA claims were not dismissed. Once again, Plaintiffs' claims of error are incorrect as the Court's finding is clearly supported by the law.

Oklahoma is not entitled to stand in the shoes of the Cherokee Nation as "co-trustee" of the same natural resources that Oklahoma expressly disclaimed. Accordingly, Plaintiffs lack standing to recover for any injury to natural resources within the Cherokee Nation's jurisdiction. *See* Order at 22 ("A plaintiff does not have standing to assert a claim of injury to property it does not own or hold in trust. Although the State has standing to assert its claims relative to its own rights in the IRW, it has no standing as a 'quasi-sovereign' to seek damages for injury to lands and natural resources in the IRW that fall within the Cherokee Nation's sovereign interests."). Because Plaintiffs do not have standing to assert claims as to all natural resources in the IRW, this Court correctly concluded that allocation of the separate interests in those resources would be a necessary element of Plaintiffs' CERCLA claims. *See* Order at 14-15. As the Court recognized, the IRW is a checkerboard of public, private, and tribal interests that have not been clearly delineated. *See* Order at 12.[12] The parties and the Court cannot adjudicate Plaintiffs' CERCLA claims without knowing which trustee has jurisdiction over which resources, as only the State's resources are at issue. At a minimum, the Cherokee Nation is a required party for any such allocation, since it would resolve the Nation's longstanding dispute with the State over ownership and jurisdiction within the IRW. *See* Order at 14-15 ("In this case, the State has made

[12] Plaintiffs' motion incorrectly represents that the natural resources for which they seek recovery are limited to "injured waters of the state and biota therein." Dkt. No. 2392 at 9 & n.6 ("the State does have a CERCLA trusteeship interest in the *waters of the IRW, as well as the biota therein* -- the natural resources at issue"). But this statement is contrary to Plaintiffs' allegations in the complaint and prior filings, which state that:

> [T]he State of Oklahoma holds *all natural resources*, including the biota, land, air and waters located *within the political boundaries* of Oklahoma in trust on behalf of and for the benefit of the public.

Dkt. No. 1215 at ¶5 (emphasis added); *see id.* at ¶¶80, 84-86 (defining the entire 1 million-acre IRW "including the lands, waters and sediments therein" as a CERCLA "facility"); *see also* Dkt. No. 1810 at 3 n.3 (alleging interest in the "injured natural resources" in the Oklahoma-portion of the IRW). Plaintiffs cannot now limit the scope of their alleged interests in order to circumvent this Court's ruling.

no attempt to determine the relative ratios or percentages attributable to itself and the [Cherokee] Nation. Furthermore, this Court can make no determination of the ratio or percentage … in the Nation's absence.").

3. Plaintiffs' Assertion of Co-Trustee Status Impairs the Cherokee Nation's Sovereign Interests

Resolving the State's claim that it can proceed as a co-trustee in the absence of the Cherokee Nation would itself run afoul of Rule 19. Plaintiffs seek a ruling that the State of Oklahoma is a co-trustee under CERCLA for all tribal properties that are encompassed within the boundaries of the State. *See* Mot. at 9-11. While this case addresses natural resources within the IRW (such as land, surface water, groundwater, and sediments), the Court's reasoning on this issue would necessarily apply to all natural resources regulated by CERCLA, anywhere.[13] Therefore, the State seeks to establish the groundbreaking principle that the Indian Tribes of Oklahoma own no resources that the State could not unilaterally subject to CERCLA assessment (including environmental sampling), litigation, and a state-devised program of restoration. This is a remarkable infringement on Congress' promise that the Cherokee would have exclusive control of their resources.

As detailed in Defendants' Rule 19 Motion, the Cherokee Nation asserts an exclusive sovereign interest in the natural resources in the Oklahoma-portion of the IRW. *See* Dkt. No. 1788 at 4-14; Dkt. No. 1825 at 1-5. The treaties of 1833 and 1835 granted the Cherokee Nation sovereign ownership and trusteeship of all waters, streambeds, biota and other natural resources

[13] The natural resources covered by CERCLA include:

> land, fish, wildlife, biota, air, water, ground water, drinking water supplies, and other resources belonging to, managed by, held in trust by, appertaining to, or otherwise controlled by the United States …, any State or local government, any Indian tribe, or, if such resources are subject to a trust restriction on alienation, any member of an Indian tribe

42 U.S.C. § 9601(16).

in an area that includes the entire Oklahoma portion of the IRW. *See* Dkt. No. 1788 at 4-8. Indeed, because of the unusually strong language in these treaties—promising exclusive perpetual sovereignty over the conferred resources—the Cherokee Nation's rights with respect to the natural resources in the IRW are stronger than those generally held by Indian Tribes. *See* Dkt. No. 1788 at 12-14 (citing Cohen § 4.07[1][a] and n.708). Congress has not divested the Cherokee of its sovereign rights and interests in these natural resources. *See* Dkt. No. 1788 at 11-14; Dkt. No. 1825 at 2-5. Thus, the Order correctly recognized these continued assertions of sovereign rights in the IRW's natural resources. Order at 10, 11-12 ("[T]he Cherokee Nation appears to have an arguable, non-frivolous claim it owns much of the surplus water within its historic boundaries.… [T]he Cherokee Nation continues to claim a real and substantial interest in some as-yet undetermined portion of the waters of the Illinois River."). This holding is consistent with well-established caselaw and should be affirmed. *See, e.g.*, *Choctaw Nation*, 397 U.S. at 635 (finding that the Cherokee Nation, not the State of Oklahoma, holds title to streambeds encompassed within the lands Congress originally granted to the Nation); *United States v. Grand River Dam Auth.*, 363 U.S. 229, 233-35 (1960) (denying a claim for compensation for the taking of water rights because the Cherokee Nation and not Oklahoma held title to the water under the above-mentioned treaties); *Brewer-Elliott Oil & Gas v. United States*, 260 U.S. 77, 87-88 (1922) (voiding oil and gas leases for a river bed, granted by Oklahoma, because the Cherokee and then Osage Tribes, not the State, held title to that land); *Cheyenne-Arapaho Tribes of Oklahoma v. Oklahoma*, 618 F.2d 665 (10th Cir. 1980) (striking down Oklahoma's attempt to regulate hunting and fishing in Indian Country).

4. Allowing Plaintiffs to Pursue their Cost Recovery Claim in Count 1 in the Absence of the Cherokee Nation Would Similarly Undercut Cherokee Sovereignty

In addition to asserting co-trusteeship over Cherokee natural resources, Plaintiffs claim

that CERCLA empowers the State to enter, assess, and remediate the natural resources of another sovereign. *See* Motion at 17-19. This argument is fundamentally inconsistent with long-established constitutional principles governing the relationships between the several States and between States and Tribes. States are "co-equal sovereigns in a federal system." *World-Wide Volkswagen Corp. v. Woodsen*, 444 U.S. 286, 292 (1980). Hence, "[t]he sovereignty of each State, in turn, implie[s] a limitation on the sovereignty of all of its sister States—a limitation express or implicit in both the original scheme of the Constitution and the Fourteenth Amendment." *Id.* at 293; *see Burnham v. Superior Court of California*, 495 U.S. 604, 609-10 (1990) (recognizing that a State's authority is cabined by its territorial limits). It is blackletter law that States may not regulate purely extraterritorial conduct, *see Healy v. Beer Institute*, 491 U.S. 324, 336 (1989); *Brown-Forman Distillers Corp. v. New York State Liquor Auth.*, 476 U.S. 573, 583-84 (1986); *Edgar v. MITE Corp.*, 457 U.S. 624, 642-43 (1982), much less physically enter upon the lands or waters of another State to conduct an assessment or restoration of that State's natural resources. *See New Jersey v. New York*, 526 U.S. 589, 119 S. Ct. 1743, 1743 (1999) (in an original action, enjoining New York from entering the portion of Ellis Island that properly belonged to New Jersey).

Much the same relationship obtains between Tribes and States, which are similarly co-equal sovereigns within the federal system. *See United States v. Washington*, __ F.3d. __, 2009 WL 2004451, at *4 (9th Cir. July 13, 2009); *see also Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 269 (1997); *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 779-782 (1991); *Osage Nation v. Oklahoma*, 260 Fed. Appx. 13, 17 (10th Cir. 2007). "It is a long- and well-established principle of Federal Indian law … that unless authorized by an act of Congress, the jurisdiction of State governments and the application of state laws do not extend to Indian lands" or other natural resources. *Kansas v. United States*, 249 F.3d 1213, 1223 n.6 (10th Cir. 2001);

see California v. Cabazon Band of Mission Indians, 480 U.S. 202, 207 (1987); *see also Texas v. United States*, 497 F.3d 491, 493 (5th Cir. 2007); *American Vantage Cos., Inc. v. Table Mtn. Ranchiera*, 292 F.3d 1091, 1096 (9th Cir. 2002) (gathering authorities addressing tribes' status as dependent domestic sovereigns).

Consistent with these constitutional principles, nothing in CERCLA authorizes one State or Tribe to enter the lands or waters of another to carry out a CERCLA investigation and remediation and then to recover the costs associated with cleaning up a sister sovereign.[14] Just as Oklahoma could not obtain "cost recovery" for assessing or remediating pollution in Texas' waters, it may not seek "cost recovery" for assessing or remediating pollution in Cherokee waters.[15] *See Wash. Dep't of Ecology v. EPA*, 752 F.2d 1465, 1467-72 (9th Cir. 1985) (rejecting Washington State's assertion of environmental jurisdiction over Indian resources pursuant to RCRA). For this very reason CERCLA parses between cost recovery actions brought by governmental entities and those brought by private parties. *Compare* 42 U.S.C. § 9607(a)(4)(A), *with* 42 U.S.C. § 9607(a)(4)(B). Plaintiffs acknowledge that they proceed under the former.

Plaintiffs' cost recovery claim is not limited to the samples and other assessment activities conducted as part of this litigation. Rather, Plaintiffs' cost recovery claim seeks to authorize the State of Oklahoma to exercise prospective control in the form of remediation

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[14] Tellingly, none of the authority referenced by Plaintiffs permitted one sovereign to enter another sovereign's jurisdiction for the purposes of incurring response costs. *See* Mot. at 15-19.

[15] Plaintiffs fail to inform the Court that they are not actually seeking to recover remediation costs properly incurred in the IRW because Plaintiffs have incurred no such costs. *See* Dkt. No. 1925 at 6 n.14 (Mar. 23, 2009) (citing 42 U.S.C. § 9607(a)(4) (requiring "a release, or a threatened release which cause[d] the incurrence of response costs")); Dkt. No. 2055 at 19-20 n.18 (May 15, 2009) (analysis of all alleged CERCLA response costs). Plaintiffs' alleged "response costs" are costs associated with several longstanding, state-wide agency programs, none of which were incurred as a result of a release or threatened release of a hazardous substance from poultry litter, and in any event are barred by the free public services doctrine. *See id.*

decisions over natural resources within the Cherokee Nation's jurisdiction. Under CERCLA, once a government prevails in a cost recovery action under Section 9607(a)(4), it may receive both past costs incurred and "a declaratory judgment on liability for response costs or damages that will be binding on any subsequent action or actions to recover further response costs or damages." 42 U.S.C. § 9613(g)(2); *see United States v. Hardage*, 982 F.2d 1436, 1442 (10th Cir. 1992); *Atlantic Richfield Co. v. American Airlines, Inc.*, 1993 U.S. Dist. LEXIS 20278 (N.D. Okla. Aug. 3, 1993) ("uncertainty as to the amount of future response costs … [or] the speculative nature of future response costs does not bar a declaratory judgment as to future liability"), *aff'd in part, rev'd in part (other grounds*), 98 F.3d 564 (10th Cir. 1996). Such a declaratory judgment may authorize the successful governmental Plaintiff to recover future response costs for the remediation actions that the Plaintiff elects to undertake, placing the burden on defendants to show "that [the government] acted arbitrarily and capriciously in choosing a particular response action to respond to a hazardous waste site." *Hardage*, 982 F.2d at 1442; *Cal. v. Neville Chem. Co.*, 358 F.3d 661, 673 (9th Cir. 2004).

Plaintiffs' cost-recovery claim (Count 1) seeks such an award. *See* Second Amended Complaint, Dkt. No. 1215 at 20 ¶76. Plaintiffs seek a declaratory judgment authorizing them to prospectively decide what remediation actions should be taken over the natural resources claimed by the Cherokee Nation, and to recover their costs for those activities. *See id*; *see also Hardage*, 982 F.2d at 1442 (mandatory liability for future costs incurred absent evidence that government "acted arbitrarily and capriciously in choosing a particular response action to respond to a hazardous waste site"); *Neville Chem. Co.*, 358 F.3d at 673 (same). The State has no authority to make decisions about what should be done to "remediate" Cherokee resources. Moreover, any decisions the State may make could conflict with the Cherokee Nation's wishes. *See supra* at 18-19; *New Mexico v. Gen. Elec.*, 467 F.3d 1223, 1248-50 (10th Cir. 2006) (noting

the disagreement between governments over how pollution should be addressed); *see also infra* at 21-23. Therefore, Oklahoma's claim for "cost recovery" offends the Cherokee Nation's sovereignty and undercut their claims to exclusive jurisdiction over the natural resources in the IRW. Accordingly, the Court was correct to preclude Plaintiffs from moving forward with their cost recovery claims in Count 1.

5. The Cherokee Nation is not Required to Accept Oklahoma's Policy or Litigation Choices

Plaintiffs' Motion assumes that the State's interests and the Cherokee Nation's interests are parallel. Accordingly, they argue, the Court erred in finding a threat to the Cherokee Nation's interests because the State's CERCLA claims seek to remediate pollution. *See* Mot. at 9-13. Any natural resource trustee, they suggest, should welcome Plaintiffs' CERCLA claims because CERCLA requires that "any recovery [that Plaintiffs obtain] must be used on behalf of the public to restore, replace or acquire the equivalent of the injured natural resource." Mot. at 12-13 (emphasis and internal quotations omitted).

These arguments overlook the substantial policy and litigation disagreements that can exist over the appropriate administration of trust responsibilities. For example, "[t]he Cherokee Nation may, as a domestic dependent sovereign, seek to forego claims for money damages," Order at 10, and instead join the State of Arkansas and EPA in concluding that the land application of poultry litter as a fertilizer does not constitute the release of a CERCLA hazardous substance, but rather constitutes a beneficial agricultural activity. *See, e.g.*, Ark. Code Ann. § 15-20-902 (poultry litter "provides nutrients that are beneficial to plant growth [and] allows the addition of nutrients to the soil at a low cost"); Ark. Code Ann. § 15-20-1102 (enacting poultry litter laws and regulations to "regulate the utilization of poultry litter to protect the area while maintaining soil fertility"); Dkt. No. 1872 Ex. 23. Alternatively, the Cherokee could choose to

forego litigation "and, instead, regulate and tax the application of poultry [litter] to lands within its jurisdiction." Order at 10.

Simply put, the Cherokee Nation and the State have a right to disagree about whether there is an injury to natural resources, the causes of any injury, and the approach to resolving any concerns about pollution. If a government decides litigation is necessary, there can still be substantial disagreements about how it should be conducted, what demands should be made, and whether or not to settle. As the Court noted, the Cherokee Nation may not agree with Plaintiffs' plan to pay half of any damages recovered to their private contingency fee counsel. *See* Order at 10. The potential for divergence between the Cherokee and the State continues even if a judgment or settlement is reached. In fact, the Tenth Circuit has noted that different governments can have vastly different ideas about what monies should be recovered in a CERCLA claim and how they should be spent. *See*, *e.g.*, *New Mexico*, 467 F.3d at 1248-50 ("The State's argument that remediation in the South Valley is not working as the EPA and NMED claim constitutes a dispute over environmental cleanup methods and standards."). In light of the room for debate on whether a case like this should be brought, how it should be prosecuted, and what remedial alternatives are desirable, this Court correctly concluded that "disposing of the case in the Cherokee Nation's absence may impair or impede the Cherokee Nation's ability to protect its interests." Order at 15; *see also* Order at 14 ("In light of the State's and the Nation's disparate views relating to jurisdiction and ownership of lands and natural resources in Northeastern Oklahoma, this court is unpersuaded that the State can adequately protect the absent tribe's interest.").

These potential differences, and the fact that they are held by sovereign nations, underscores once again why the Cherokee Nation is a necessary party to this action, and why the Court was correct to preclude Plaintiffs from moving forward with either of their CERCLA

claims in its absence.

B. Adjudication of Count 2 in the Cherokee's Absence Will Subject Defendants to a Substantial Risk of Double, Multiple or Otherwise Inconsistent Obligations

Plaintiffs are likewise incorrect that the Court misapprehended the law "in concluding that adjudication of Count 2 in the Cherokee Nation's absence will subject Defendants to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations." Dkt. No. 2392 at 13-14. In disputing the Court's ruling on this point, Plaintiffs rely entirely on CERCLA's bar on "double recovery for natural resource damages … for the same release and natural resource." 42 U.S.C. § 9607(f)(1); *see* Dkt. No. 2392 at 13-14. Yet, as noted by the Court's Order, CERCLA's bar on double recovery cannot protect against the substantial (and real) risk of double, multiple or otherwise inconsistent obligations in this instance. *See* Order at 15-16, 17-18 (citing inter alia *Davis v. United States*, 343 F.3d 1282, 1292 (10th Cir. 2003)). The Cherokee Nation's interests in the IRW have not been allocated or adjudicated. Because the State claims trusteeship over the entire IRW, its claims inherently conflict with those of the Nation. If this Court allows the State to recover NRDs for any portion of the IRW, the Defendants will face the risk that the Nation will seek NRDs for those same resources. As a non-party, the Nation will claim that it is not be bound by this Court's judgment regarding whether an individual resource belongs to the State or the Nation. Accordingly, all of those issues would need to be re-litigated.

Moreover, although Plaintiffs limit this argument to Count 2, they overlook the fact that proceeding with Count 1 will similarly expose Defendants to the possibility of duplicative claims for costs or prospective remediation in the event that the Cherokee Nation undertakes a separate action. CERCLA's bar on double recoveries for NRDs does not apply to duplicative claims for assessment and restoration. If the Cherokee Nation brings its own suit, it will likely assert its

own past and prospective costs under a CERCLA cost-recovery theory and, as noted above, may disagree with the State's choices about what should be done to remediate the alleged pollution in the IRW.

The fact is that, as the Court noted previously, CERCLA's bar on double recovery provides no protection against a subsequent lawsuit by the Cherokee. *See* Order at 17-18 ("[I]n the event the State's claims fail, defendants will remain at risk of facing claims from the Cherokee Nation for damages related to alleged pollution of lands, water and natural resources within the Nation's jurisdiction in the IRW."). Because the Cherokee are not in privity with the State, *res judicata* and collateral estoppel are unlikely to apply to any subsequent suit by the Cherokee—thus subjecting Defendants to re-litigation of the same issues and a substantial risk of inconsistent obligations. *See* Dkt. No. 1788 at 19-20; Order at 16 ("Nor does CERCLA prohibit subsequent litigation of a new CERCLA claim when the parties in the second action are not the same as, or in privity with, the parties in the prior action.").[16] At a minimum, Defendants face the risk of multiple lawsuits to determine the scope and nature of the State and Cherokee interests to define what, if any, separate litigation may proceed. *See* Order at 16 ("Insofar as the Cherokee Nation is the steward of a separate and distinct subset of the natural resources in the IRW, it is not in privity with the State of Oklahoma.").

CONCLUSION

For the foregoing reasons, Plaintiffs' motion for reconsideration of the Court's July 22, 2009 Opinion and Order should be denied in its entirety.

[16] Plaintiffs' motion for reconsideration in no way addresses the Court's reasoning in these respects, either of which constitute a substantial risk sufficient to warrant satisfaction of this Rule 19 factor. *See* Fed. R. Civ. P. 19(a)(1)(B)(i). Under the rules governing motions for reconsideration, this alone is a sufficient basis for Plaintiffs' Motion to be denied.

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